In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 166.

INTERLAKE STEAMSHIP COMPANY, a corporation, and PICKANDS-MATHER & CO., a co-partnership,

Respondents,

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION, CHARLES LAPORTE, FRED L. BEATTY, JOHN DOE, RICHARD ROE, AND MARINE ENGINEERS BENEFICIAL ASSOCIATION, LOCAL 101,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF OF RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The Memorandum of the District Court of St. Louis County, State of Minnesota (R. 33-46), unreported, is printed in Appendix C, *infra*. The Opinion of the Supreme Court of Minnesota (App. A of Petition) is reported at 108 N. W. 2d 627 (1961).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether the State courts had, or could exercise, jurisdiction in an action brought to enjoin a union composed of supervisors from picketing employers of supervisors (who were and are not members of said union and whom the Congress specifically excluded from the operation of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947) for the purposes of compelling said employers (1) to recognize said union as the representative of their supervisor employees, (2) to enter into a union shop contract covering their supervisor employees with said union and (3) to force their supervisor employees to join said union as a condition of continued employment, where the activity of said union was alleged, and was found by the State courts, to be in violation of the statutes and public policy of the State and hence unlawful.

The petition does not, and could not, invoke review of the question whether the Supreme Court of Minnesota correctly construed and declared, and correctly applied, the statutes and public policy of the State of Minnesota.

STATUTES INVOLVED.

Sections 2(3), 2(5), 2(11) and 14(a) of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947; Act of June 23, 1947, c. 120, Title I, 61 Stat. 137, 138, 151; 29 U. S. C. 152(3), 152(5), 152 (11), 164(a). Printed App. A to this brief.

Contrary to Petition 2, in our opinion Sections 8(b) (2), 8(a)(3) and 8(b)(4) of the Act as amended, are severally irrelevant. Since no question is, or could be, presented with respect to the interpretation or application of the State statutes by the Supreme Court of the State of Minnesota, those statutes are not here involved.

STATEMENT.

Respondent, Interlake Steamship Company (hereinafter called "Interlake") is the owner, and Pickands-Mather & Co. (hereinafter called "P-M") is the operator, of the second largest bulk cargo fleet of ships operating on the Great Lakes. (R. 57, 156, 158.)* Petitioner, Marine Engineers Beneficial Association, Local 101 (hereinafter called "MEBA") is a voluntary Association which admits to membership licensed Marine engineers employed on commercial vessels operating on the Great Lakes. (R. 57.) Petitioner LaPorte is an agent and business representative of MEBA, whose duties include direction of MEBA's activities in Duluth, Minnesota. (R. 57.)

During the afternoon of November 11, 1959, Interlake's Steamer Samuel Mather arrived with a cargo of coal at the Duluth dock of the Carnegie Dock & Fuel Company (hereinafter called "Carnegie"). The unloading of the ship by Carnegie's employees, which would normally require about 34 hours, commenced shortly after the ship's arrival. (R. 21, 119.)

About 6:30 A. M. on November 12, 1959, MEBA placed pickets across the only entrance road to the Carnegie dock. (R. 58.) Due to the presence of this "picket line," the Carnegie employees refused to proceed with the unloading of the ship and, for approximately 2 hours, independent truck drivers also refused to enter the dock premises to take delivery of coal from Carnegie. (R. 58.)

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* Pursuant to stipulation between the parties, the case was submitted to the trial court for final decision upon the record made at the 5-day hearing on the motion for preliminary injunction. After final hearing, the trial court adopted its amended findings of fact and conclusions of law made after the hearing on the motion for preliminary injunction (R. 56-68) as its findings and conclusions on the merits. (R. 73-5.)

Some of the pickets carried signs of which the following is fairly illustrative:

> "Pickands Mather Unfair to Organized Labor. This Dispute Only Involves P-M. MEBA Loc. 101 AFL-CIO." (R. 58.)

Petitioner LaPorte stated that it was the intention of MEBA Local 101 to picket every Interlake ship which it could locate in the Duluth Harbor. (R. 59, 85-6, 92, 128, 160.)

Formal picketing at the entrance to the Carnegie dock ceased after a temporary restraining order issued by the trial court was served on the afternoon of November 12, 1959. However, the pickets continued to congregate nearby and to prop up their signs against cars also parked nearby; and Carnegie's employees continued their refusal to unload the Samuel Mather until after hearing on the motion for, and until after issuance and service of, a temporary injunction. (R. 59, 131.) None of the pickets was an employee of Interlake or P-M or Carnegie. (R. 87, 89, 160.)

Throughout the period here involved there was no dispute of any kind between Carnegie and its employees or their union. (R. 117.) At and prior to the commencement of the aforesaid picketing on November 12, 1959, there was no dispute between Respondents and their licensed engineers; there had been no communication whatsoever between Petitioners and Respondents; neither MEBA Local 101, nor anyone acting for or on its behalf, had made any written or oral demand or request whatsoever of Respondents, or either of them. (R. 60.) For many years Respondents had established and enforced a uniform policy which prohibited all persons other than employees, their wives, authorized inspectors and suppliers

from boarding any of their vessels at any time for any purpose without a "boarding pass" issued by a Company official. (R. 60, 193, 199-200.) Petitioners had never requested Respondents (1) to issue a boarding pass or boarding passes for any purpose, (2) to enter into negotiations of any kind or (3) to agree to an election among the engineers employed on their vessels. (R. 61-2, 175, 198, 274, 275.)

Certain additional facts with respect to Petitioners' picketing, which were relevant to the cause of action under State law, are not deemed material to the consideration of the only question presented by the instant petition. However, in case this Court should desire to consider or examine those facts, they are summarized below.*

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* About 11:00 P.M. on November 12, 1959 (after service of the temporary restraining order on the pickets at the entrance to the Carnegie dock premises) MEBA placed pickets (carrying the same legends as the signs described, *supra*) at the entrance to the Duluth plant of Interlake Iron Corporation where coal was being unloaded for use at said plant from Interlake's ship Mills. (R. 59-60, 97-100, 103, 106, 107, 161, 162.) There was no dispute between Interlake Iron Corporation and its employees or their union; none of the employees of Interlake Iron or of either Respondent was on the picket line; and MEBA did not have or seek any members among employees of Interlake Iron. (R. 59-60, 96, 99.) The president of the union representing Interlake Iron's employees informed its management that some of its employees would honor any picket line around the plant and that MEBA had "pressured" him to that end. (R. 97, 106; Sup. R. 17.) However, this picketing ceased in about an hour upon service of the temporary restraining order on said pickets; and none of Interlake Iron's employees ceased work in the interim. (R. 59-60.)

On the morning of November 15, 1959, Interlake's steamer Pickands arrived in the Duluth harbor with a cargo of coal consigned to the Carnegie dock, which could accommodate only one ship at a time. Consequently, the Pickands was compelled to anchor outside of the harbor for a number of days pending the unloading of the Samuel Mather. (R. 59, 116, 130-1.) By thus preventing the steamers Mather and Pickands from unloading in the regular course, Petitioners caused Respondents to sustain a loss of $6,000.00 per day exclusive of any profit. (R. 61.)

During the trial Petitioners stated that the previously undisclosed purpose of the aforesaid picketing was to obtain from Respondents an agreement to hold an election by secret ballot among engineers employed on Interlake vessels for the alleged purpose of determining whether said engineers, freely and voluntarily, desired to be represented by MEBA Local 101, "that such an election should be conducted by an impartial body such as the American Arbitration Association," and that the NLRB would not accept jurisdiction when Petitioners were seeking "to represent supervisory employees" such as the engineers employed on Interlake vessels. (R. 111-2.)

Each of Respondents' vessels (including the Samuel Mather and Pickands) has four engineer officers, viz., a chief engineer, a first assistant engineer, a second assistant engineer and a third assistant engineer, each of whom is required to have a license issued by the U. S. Coast Guard.* The chief engineer, who ranks next to the captain, has direct over-all charge of, and responsibility for, the engineer department. The three assistant engineers regularly stand watches of 4 hours each during which each has direct charge of, and responsibility for, the operation, maintenance and repair of all machinery and equipment in the engineering department, for operation of the ship at peak efficiency, for prompt compliance with all commands from the bridge, and for supervision of unlicensed employees. (R. 161, 178-9, 185-6, 206-11; Sup. R. 18-9.) The duties and responsibilities of all engineers and assistant engineers employed on Interlake vessels are accurately summarized in the following finding of the trial court which was approved by the State Supreme Court:

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* As to the foregoing requirement and numerous duties and responsibilities imposed upon engineers licensed to serve on steam vessels including those operating on the Great Lakes, see 46 U. S. C. 221, 222, 224, 229, 231, 240.

> "13. All engineers and assistant engineers employed on Interlake vessels stand watches during which they are in charge of and responsible for the operation and condition of the vessel's propulsion mechanism and responsibly direct, control and supervise the work of the firemen, oilers and coal passers on duty during such watch; they hire, fire, transfer and change the status of and discipline the persons working under them and have authority to and do make effective recommendations respecting the employment and tenure of employment of the people working under them; they handle initially grievances of the employees who are subject to their supervision; the exercise of authority by the engineers and assistant engineers requires the use of independent judgment and discretion; and all such engineers are required to be licensed by the United States Coast Guard." (R. 60-61.)

In judicial admissions made to shorten the hearing in the trial court, Petitioners admitted that all engineers employed on Interlake Steamer Samuel Mather, which was the direct object of the picketing here involved, were and are supervisors and stated that they were unable to make the same admission with respect to every Interlake vessel merely because they did not possess detailed information with respect to every vessel in the Interlake fleet. (Sup. R. 18-9.) In an affidavit the president of National MEBA stated that every member of his union had the very extensive duties, responsibilities and independent authority therein described. (R. 202-4.)

The trial court found that the purpose and objective of the picketing and ancillary activities of MEBA Local 101 were to coerce Respondents to recognize MEBA Local 101 as collective bargaining agent for the licensed engineers employed on Interlake vessels, to force Interlake engineers to become members of MEBA Local 101

and to obtain a union shop agreement under which each licensed engineer hired by Respondents after a specified date would have to become a member of MEBA Local 101 within 30 days after his employment as a condition to continued employment; that Respondents did not claim to represent, or to be the authorized collective bargaining agent for, a majority of the licensed engineers employed by Respondents;* that Petitioners have consistently contended and taken the position in all federal judicial and administrative proceedings that neither the federal courts nor the NLRB has any jurisdiction over them because they are not "labor organizations" within the meaning of the National Labor Relations Act as amended; and that the activities of petitioners hereinbefore described violated certain statutes and the public policy of the State of Minnesota. (Fdgs. 15-20, 23-4; R. 61-3.)

After a 5-day hearing and after extensive briefs had been filed by plaintiffs and defendants, a temporary injunction was granted on November 18, 1959. (R. 30, 46, 66, 70.) On March 28, 1960, after final hearing, a final decree for a permanent injunction was entered. (R. 75.) On March 30, 1961, the Supreme Court of Minnesota unanimously affirmed said decree. (Pet. 2.)

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* Respondents had no knowledge that MEBA had any members among the licensed engineers or among unlicensed personnel employed on the Interlake vessels. While Petitioners were unwilling to concede that MEBA did not have any member who was employed on the Interlake vessels, Petitioners were either unable or unwilling to introduce evidence that any member of a crew on an Interlake vessel was a member of MEBA. (R. 160, 182, 211, 212, 283, 284.)

ARGUMENT.

In the instant case, the facts, found by the State courts on uncontradicted and undisputed evidence and alleged in the complaint, clearly established, both as a matter of fact and law, that the licensed engineers employed on the Interlake ships are supervisors whom the Congress expressly and specifically excluded from the operation of the National Labor Relations Act, and from the jurisdiction of the National Labor Relations Board, by amendments made to that Act in Title I of the Labor Management Relations Act, 1947.

Upon the instant record there is no room for controversy as to the evidentiary facts, as to the only factual inferences which can rationally be drawn from them, or as to the conclusions of law which necessarily follow. As justification for issuance of the writ, Petitioner relies solely upon an unsupportable contention that, even within the narrow area delimited by the admitted facts, the Minnesota courts did not have, or could not exercise, jurisdiction to enjoin a union of supervisors (which sought to coerce Respondents to cooperate in forcing Respondents' licensed engineer officers to become members of such union) from carrying on an activity which, as found and held by the Minnesota courts, violated, and was prohibited by, the statutes and public policy of that State. The decision of the Minnesota courts on the only question presented by the Petition was manifestly correct. Under the language and legislative history of the Act, no other result could have been reached. There is no conflict of decision. Petitioners' contention that the Minnesota courts were without jurisdiction is so lacking in substance as to be frivolous; and no question of federal law is presented which requires, or would justify, review by this Court.

I. THE SUBJECT MATTER OF THE ACTION IN THE MINNESOTA COURTS FELL EXCLUSIVELY WITHIN AN AREA OF LABOR MANAGEMENT RELATIONS WHICH THE CONGRESS EXPRESSLY EXCLUDED FROM THE OPERATION OF THE NATIONAL LABOR RELATIONS ACT AND, A FORTIORI, FROM THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

When, as here, a case brought in the State courts involves an area of labor management relations which the Congress has specifically excluded from the operation of the National Labor Relations Act as amended, it is irrelevant to argue, as do Petitioners, that, had the case involved an area of labor management relations within the scope of that Act, the National Labor Relations Board would have had exclusive or primary jurisdiction and that, upon such an irrelevant hypothesis, the State courts either would not have had, nor could not have exercised, jurisdiction.

A. Both the Language and Legislative History of the 1947 Amendments to the National Labor Relations Act Conclusively Establish That Congress Intentionally and Expressly Excluded From the Operation of That Act the Area of Labor Management Relations Which Was Involved in the Minnesota Courts.

Prior to the decision of this Court in *Packard Co. v. Labor Board*, 330 U. S. 485 (Mar. 10, 1947), there was great uncertainty as to whether supervisors were employees within the meaning of the National Labor Relations Act of 1935. In holding that supervisors were employees within the meaning of the 1935 Act, this Court relied upon the circumstance that the term "employee," as defined in the 1935 Act, included "any employee" without any qualification, limitation or exception whatsoever and that supervisors are obviously employees both in common

usage of the word "employee" and in its "most technical sense at common law." (l.c. 488.) Promptly after that decision, Congress enacted Title I of the Labor Management Relations Act, 1947, which amended the 1935 Act so as to make inescapably clear the congressional intent to exclude supervisors from its operation.

First: Congress amended the definition of the term "employee" so that, so far as here material, it now reads (29 U. S. C. 152(3)):

> "The term 'employee' shall include any employee, and shall not be limited to employees of a particular employer, unless this subchapter explicitly states otherwise, * * * *but shall not include* * * * *any individual employed as a supervisor*, * * *." *

Thus, the Congress specifically excluded "supervisors" from the operation of the Act. A further inevitable and intended effect of the foregoing definition of the term "employee" was to exclude any union of supervisors from the category of a "labor organization" within the meaning of Section 2(5), 29 U. S. C. 152(5).

Second: In order to avoid any possibility that the exclusion of supervisors from the operation of the 1935 Act as amended might be defeated or emasculated by fanciful, loose or arbitrary construction of the term "supervisor," Congress incorporated in the 1935 Act a clear and specific definition of that term, which reads (29 U. S. C. 152(11)):

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances,

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* All emphasis in this brief is supplied unless otherwise stated.

> or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

That the licensed engineers employed on ships owned by Interlake and operated by P-M are supervisors within the foregoing definition prescribed by the Congress, is not debatable (*Supra* p. 7).

Third: Although seemingly an unnecessary precaution, Congress also amended the 1935 Act by enacting Section 14(a) of Title I of the Labor Management Relations Act, 1947, 29 U. S. C. 164(a), which reads:

> "Nothing *herein* shall probibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." (Italics supplied.)

In the foregoing Section, the words "Nothing *herein*" clearly include each and every provision of the National Labor Relations Act as so amended. Manifestly, Congress shared common knowledge that an employer would not and could not employ supervisors unless he also had other employees to be supervised. To suggest that Congress did not intend to exclude labor management relations between supervisors and their employers if an employer also had other employees to be supervised who would necessarily come within the operation of the Act as amended, would be sheer nonsense and would attribute to the Congress an intent to do a vain and futile thing. The obvious purpose of Congress in enacting Section 14(a) was to preclude any possibility that, by latitudinarian con-

struction, by misapplication of the doctrine of federal preemption or by misapplication of the doctrine of primary administrative jurisdiction, the Act as amended, or its mere existence, could be held not only to exclude supervisors from the Act but to deprive them of such rights as they had, or should have, under the statute and common law of the respective States.

The language of the foregoing amendments to the Act is, we believe, too clear to require or to permit resort to legislative history. However, were the congressional language open to any construction other than that hereinbefore stated, the legislative history of Title I of the Labor Management Relations Act of 1947, by which such amendments were made, would make inescapably clear the intent of Congress to exclude supervisors and their unions from the operation of the National Labor Relations Act. The excerpts from that legislative history, which are printed in Appendix B hereto, are alone sufficient to compel the foregoing conclusion.

In summary, the Congress specifically and categorically excluded from the operations of the National Labor Relations Act the precise area of labor management relations which is the exclusive subject matter of the action in the Minnesota courts.

B. The Petition Does Not Present Any Substantial Federal Question With Respect to the Jurisdiction of the State Courts; and the Decision of the Minnesota Supreme Court In This Respect Is Clearly Correct.

To hold, under the undisputed facts of the instant case, that the Minnesota courts had no jurisdiction to construe, apply and enforce the statutes and public policy of the State of Minnesota, would involve not only a complete disregard of the statutory language and of the clearly express

intent of the Congress but also would constitute judicial legislation.

Throughout our national history the authority of the Congress to exercise part, but not all, of its exclusive constitutional legislative power with respect to any subject and, *a fortiori*, to exclude part of a particular subject of congressional legislation from federal regulation, has never been questioned or doubted. Where, as here, the Congress, in exercising its exclusive constitutional power to legislate with respect to a particular subject, expressly excludes part of the subject matter from the legislation, there is no room for application of the doctrines of federal pre-emption or primary administrative jurisdiction. If such a careful, clear and painstaking exclusion of the area of labor management relations between supervisors and their employers is not effective to preserve State jurisdiction and to enable the Congress to escape defeat by applications of the doctrines of primary administrative jurisdiction or federal pre-emption, then the Congress has ceased to be an independent branch of the Government.

In each of the following cases, it was held that the State court had, and could exercise, jurisdiction in the factual situation presented. *Pappas v. Stacey,* 151 Me. 36, 116 Atl. 2d 497, appeal dis. 350 U. S. 870; *Teamsters Union v. Vogt,* 270 Wisc. 315, 74 N. W. 2d 749, aff'd. 354 U. S. 284; *Cooperative Refinery Ass'n., v. Williams,* 185 Kans. 410, 345 P. 2d 709, Cer. den. 362 U. S. 920; *McLean Co. v. Brewery Co.'s Drivers, etc. Local No. 993,* 254 Minn. 204, 94 N. W. 2d 514, Cer. den. 360 U. S. 917. Each of the foregoing cases involved activity or conduct within the area of labor management relations which was clearly and admittedly subject to the National Labor Relations Act; and jurisdiction of the State courts, if any, depended upon, and required a determination of, the precise character of

the activity or conduct involved and its relation to the provisions of the Act to which it was subject. However, when the subject matter of a State action clearly falls within an area of labor management relations which Congress has expressly excluded from the operation of that Act, such a determination and examination is clearly irrelevant because jurisdiction of the State court could not possibly depend upon, or be affected by, the nature and relation of the activity to the provisions of a statute from the operation of which it has been expressly excluded.

Where, as here, the facts found by the State court establish that the subject matter of the action has been excluded by the Congress from the operation of the National Labor Relations Act, the jurisdiction of a State court can not rationally be denied upon the theory that a State court would be, or might be, barred from exercising jurisdiction over a like activity in the wholly different area of labor management relations which is covered by the Act. In *Benz v. Compania Naviera Hidalgo,* 353 U. S. 138, the subject matter of an action in a diversity case (a labor dispute) clearly came within the exclusive or primary jurisdiction of the NLRB unless excluded from the operation of the National Labor Relations Act as amended. In sustaining diversity jurisdiction to apply state law, this Court held that the failure of Congress expressly to make the Act applicable to labor disputes in the situation there involved, constituted an implied exclusion and sustained jurisdiction of the district court to grant a state common law remedy. *A fortiori,* where, as here, the Congress has *expressly* excluded the subject matter of an action from the operation of the Federal Act, it would be fanciful to hold that the Federal Act deprives State courts of jurisdiction to enforce the statutes and public policy of the State.

II. CONTRARY TO PETITIONERS' ASSERTIONS, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT ON THE ISSUE OF JURISDICTION AND ANY DECISION OF THIS COURT, OF A FEDERAL COURT OF APPEALS OR, WERE IT MATERIAL, OF THE NATIONAL LABOR RELATIONS BOARD.

As hereinbefore shown, the instant case involved an area of labor management relations which the Congress expressly excluded from the operation of the National Labor Relations Act. Consequently, whether a similar factual situation, which falls within the area of labor management relations subject to the operation of that Act, would be subject to, or "arguably subject to," Section 8 or any other section of that Act is wholly irrelevant. Nevertheless, Petitioners' argument that the state courts did not have, or could not exercise, jurisdiction, is based upon the false premise that the subject matter of the action in the Minnesota courts fell within the area of labor management relations covered by the National Labor Relations Act. Having thus set up a straw man, Petitioners irrelevantly argue that, upon the foregoing erroneous premise, their activity would *then* have constituted, or "arguably" might *then* have constituted, an unfair labor practice under Section 8 of the National Labor Relations Act.*

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* Seemingly further to obscure the only question presented, Petitioners quote certain findings of the Minnesota courts as though they had been made in relation to the National Labor Relations Act as amended and irrelevantly argue that, upon the basis of the facts so found, the activity of Local 101 would violate certain provisions of Section 8 of the Federal Act if carried on by a union subject to that Act. (Pet. 5-7.) As hereinbefore shown neither Local 101 nor the licensed engineers were or are subject to the Federal Act; and such findings were made and were relevant solely upon the issue whether the activity of Local 101 violated the statutes and public policy of the State of Minnesota.

A. There Is No Conflict With Any Apposite Decision Of This Court.

Upon that false premise Petitioner argues that the decision of the Minnesota Supreme Court conflicts with decisions of this Court in *Garner v. Teamsters Union*, 346 U. S. 485; *Weber v. Anheuser Busch Co.*, 348 U. S. 468 and *San Diego Unions v. Garmon*, 359 U. S. 236. Each of those cases involved an area of labor management relations which was admittedly subject to the National Labor Relations Act as amended. The union activity involved in each case, if proved, was clearly, or at least arguably, either a violation of, or protected by, one or more provisions of that Act. In the factual situation presented in each of those cases, this Court held that the Congress had vested exclusive or primary jurisdiction over the subject matter in the National Labor Relations Board and, consequently, that state courts, as well as federal courts, were thereby deprived of jurisdiction, or at least were required to withhold the exercise of jurisdiction, until after final adjudication by that Board.

However, the facts alleged in the Complaint and found by the Minnesota courts clearly establish that the subject matter of the instant case falls squarely within an area of labor management relations which Congress expressly excluded from the operation of the National Labor Relations Act as amended. Manifestly, each of the foregoing cases is inapposite.

Nevertheless, it is significant that in the *Garner* case this Court observed that the National Labor Relations Act "leaves much to the states" (l. c. 488) and further, that, in enacting such legislation, Congress, if it chooses "can save alternative or supplemental state remedies by express terms, or by some clear implication" (l. c. 501). As hereinbefore shown, the Congress *specifically and expressly*

excluded the area of labor management relations involved in the case before the Minnesota Courts from the operation of that Act. Moreover, in enacting this exclusion, Congress made clear that its express purpose was to avoid the consequences of the construction of the National Labor Relations Act of 1935 in *Packard Co. v. N. L. R. B.*, 330 U. S. 485. The congressional intent to exclude from the operation of the National Labor Relations Act the area of labor management relations involved in the Minnesota courts could not be more clearly or emphatically evidenced.

B. Contrary to Petitioners' Assertions, There Are No Conflicts Between the Decision of the Minnesota Supreme Court and Any Decision of a Federal Court of Appeals or, Were it Material, of the National Labor Relations Board. (Pet. 8-10.)

As a reason for granting the writ, Petitioner also asserts an alleged conflict "between the position of the Minnesota Supreme Court" and that of the Second Circuit in *National MEBA v. NLRB*, 274 F. 2d 167, (2d Cir.). In that case the Second Circuit held that, upon the basis of the sketchy, inconclusive and out-dated evidence in the record (including a judicial admission by MEBA), the court could not say that the Board's finding that National MEBA was a "labor organization in April, 1957," did not meet the standards of *Universal Camera Corp. v. NLRB*, 340 U. S. 474. (l. c. 175.) However, after criticizing the failure of the Board to require more substantial, complete, and up-to-date evidence, the Court said:

> "*We are not saying* that MEBA and MMP are or are not in fact 'labor organizations' within the meaning of § 8(b) *today. We say only that we cannot hold,* on the evidence in this record, that the Board was unjustified in finding that they were *in April, 1957.*" (l. c. 175.)

On the other hand, the case at bar involved an entirely different factual situation existing *in November 1960* at a widely different geographic location and a record in which the evidence was complete, up-to-date and neither contradicted nor disputed. As stated by the Minnesota Supreme Court:

> "The trial court found that the engineers employed by plaintiffs were supervisors within the meaning of the above Federal provisions. That finding has ample support in the record and is not, we believe, seriously disputed by defendants." (Pet. 17) *

Upon the record in the instant case, MEBA Local 101, the licensed engineers employed on Respondents' ships, and the activity which constituted the subject matter of the State action, were clearly excluded from the operation of the National Labor Relations Act and from the jurisdiction of the National Labor Relations Board as was also held by the Second Circuit in *A. H. Bull Steamship Co. v. National MEBA*, 250 F. 2d 332, 335-6, 339. The most that could be said is that the Minnesota courts and the Second Circuit in 274 F. 2d 167 drew different inferences of ultimate fact from wholly different records which contained wholly different evidence and spoke at wholly different times.**

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* At page 55 of their brief in the Minnesota Supreme Court, Petitioners, in discussing a California decision, said:

> "Therefore, the California decision is distinguishable from the instant case where the Marine Engineers Beneficial Association is made up of supervisory employees and where, in the event of organization, it would not include the nonsupervisory employees of the plaintiff."

** Incidentally, it should be noted that the size of crews, and the duties of licensed engineers, on the huge bulk cargo steamships operating on the Great Lakes and the size of crews, and duties of engineers, on a barge, are hardly comparable. As to the federal qualifications required for, and the duties and responsibilities imposed on, engineers employed on steam vessels on the Great Lakes, see 46 U. S. C. 221, 222, 224, 229, 231 and 240.

If, contrary to our view, the foregoing could constitute a conflict of any kind, it plainly is not the sort of conflict which this Court will review and resolve on a writ of certiorari.

The Petition further cryptically states "See also *Schauffler v. Local 101 MEBA*, 180 F. Supp. 932." (Pet. 8.) This is a report of a hearing upon a motion for a preliminary injunction to preserve the status quo pending determination of the case on the merits. Findings and conclusions upon such a motion are preliminary, tentative and "for the time being only" even in the action in which they are made. Partly upon preliminary and tentative evidence and partly upon an erroneous view that it was bound by *National MEBA v. NLRB*, 274 F. 2d 167, the District Court issued a temporary injunction to preserve the status quo. (l. c. 935, 938.) Apart from the fact that this Court does not grant certiorari to resolve conflicts with a decision of every district court, this tentative and preliminary finding upon a tentative and different record could not conceivably constitute a conflict of decision within the meaning of that term as used in Rule 19-1(a) of this Court.

To support a claim of alleged conflict "between the position of the Minnesota Supreme Court" and that of the National Labor Relations Board, Petitioners state:

> "See *Graham Transportation Company and Brotherhood of Marine Engineers*, 124 NLRB 960 (1959), where the Board directed an election among marine engineers *similar* to those involved here." (Pet. 8, fn. 2.)

Were an alleged conflict with an administrative decision a ground for certiorari, no conflict could be predicated upon the foregoing decision of the Board. *Globe Steamship Co., et al. and Great Lakes Engineers Brotherhood,*

Inc., 85 N. L. R. B. 475, involved *precisely the same licensed engineers (including Interlake's engineers) as does the instant case.* In the *Globe* proceeding the Board held that the engineers and assistant engineers *employed on Interlake vessels* were supervisory employees and that a union seeking to organize and represent them was not subject to, and had no rights under, the Federal Act. Since that decision, there has been no change in the status or duties of Interlake's engineers or assistant engineers. (R. 200.)

Petitioners also cite and quote from *Plumbers' Union v. Door County*, 359 U. S. 354, as presenting "a comparable problem" in which this Court allegedly granted certiorari "to resolve a *similar conflict.*" (Pet. 8-9.) In that case Door County had let a general contract and eight smaller contracts to different contractors for construction of an addition to its County Courthouse. Since the successful bidder for the plumbing work employed non-union labor, the plumbers union threw a picket line around the courthouse which was effective to stop all work because the union members employed by the other contractors would not cross the picket line. Door County, the plumbing contractor, and the general contractor sought an injunction in the state court. No employee of the county was involved. The employers, the employees, and the unions involved were all admittedly subject to the National Labor Relations Act; and the union activity involved, if proved, was clearly, or at least "arguably," either a violation of, or an activity protected by, one or more of the provisions of that Act.

State jurisdiction in the *Door County* case was predicated upon the ground that, as a "political subdivision," Door County was excluded from the Act and that, unless the County could maintain an action in the state court,

it would have no remedy. However, holding that the Act authorized any person (natural or artificial), including those excluded from the definition of employer in the Act, to file with the Board an unfair labor practice charge claiming a violation of the Act by a union *subject to the Act*, this Court further held that the Board was not deprived of exclusive or primary jurisdiction of the Union's alleged violations of the Act. In the instant case, "the picketing" clearly falls within an area of labor management relations which Congress expressly excluded from the operation of the Act; and the case is plainly inapposite. Moreover, in the instant case, unlike the *Door County* case, Respondents had and have no remedy except in the Minnesota courts.

III. PETITIONERS' ATTEMPT TO EVADE STATE JURISDICTION IN AN AREA OF LABOR MANAGEMENT RELATIONS WHICH THE CONGRESS HAS EXPRESSLY EXCLUDED FROM THE NATIONAL LABOR RELATIONS ACT BY MISUSE OF THE DOCTRINES OF PRIMARY ADMINISTRATIVE JURISDICTION AND OF FEDERAL PRE-EMPTION IS UNSUPPORTED AND PLAINLY FRIVOLOUS. (Pet. 7-8.)

Petitioners argue that the Minnesota courts did not have, or could not exercise, jurisdiction because the National Labor Relations Board had primary jurisdiction to determine whether the licensed engineers employed by Respondents were supervisors and whether the picketing by supervisors (i.e. Local 101) constituted an unfair labor practice and a violation of certain sections of the National Labor Relations Act. (Pet. 7-8, 9.) In other words, Petitioners contend that where Congress has specifically excluded an area of labor management relations from the operation of that Act, the state courts do not have, or cannot exercise, jurisdiction over labor management relations in the excluded area unless and until the Board shall have

purported to determine, as a matter of fact and law, that the subject matter of the state action comes within state jurisdiction. Under this theory the Congress, by expressly excluding an area of labor management relations from the Federal Act and, *a fortiori*, from the jurisdiction of the Board, also excluded state jurisdiction in the excluded area either by federal pre-emption or by vesting primary jurisdiction in the NLRB!

As stated by the Second Circuit in *A. H. Bull Steamship Co. v. National MEBA*, 250 F. 2d 332 at 339:

> "The whole thrust of the supervisor provisions in the Taft-Hartley Act of 1947 was to remove supervisors from the operation of the National Labor Relations Act and return them 'to the basis which they enjoyed before the passage of the Wagner Act.' "

The fallacy of the foregoing theory, which is obvious on mere statement, is emphasized by its attempted application to the instant case. In the instant case the facts alleged in the Complaint and the facts found by the state courts inescapably compel a conclusion of law that the subject matter falls within an area of labor management relations excluded from the Federal Act, and, *a fortiori*, from the jurisdiction of the NLRB. If the subject matter of the state action could have been, or could be presented to the NLRB by any procedure and the NLRB had purportedly reached a different conclusion, its conclusion would obviously be based upon a gross error of law.

Petitioners' argument assumes that any "picketing" comes within the National Labor Relations Act and within the primary jurisdiction of the NLRB. Manifestly, however, whether "picketing" comes within either depends, among other things, upon whether the area of labor management relations, in which the picketing is done, is or is not excluded from the operation of the Act.

As carefully defined by the Congress, the dimensions of this excluded area of labor management relations are delimited solely by the character of the employees involved (i.e., supervisors) and not at all (1) by the nature of the activity carried on by them or by any union of which they are members, or (2) by the character of the dispute, if any, between them and their employers. We have not found, and Petitioners do not cite, any decision which holds that State courts do not have, or can not exercise, jurisdiction in an excluded area of labor management relations unless and until the NLRB shall have determined, as matters of fact and law, that the subject matter of the State action is within the jursdiction of a state court. Indeed, the decisions of this Court show that the contrary is true even in the area of labor management relations which clearly and admittedly is subject to the National Labor Relations Act.

In the area of labor management relations which were admittedly subject to the National Labor Relations Act, this Court has repeatedly held that the "Congress did not exhaust the full sweep of [its constitutional] legislative power over industrial relations" (*Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480); that "Congress designedly left open an area for state control" (*Auto Workers v. Wisconsin Board*, 336 U. S. 245, 253); that the Federal Act "leaves much to the States, though Congress has refrained from telling us how much" (*Garner v. Teamsters Union*, 346 U. S. 485, 488); that things left to the States include injurious conduct which is "governable by the State or it is entirely ungoverned" (*Auto Workers v. Wisconsin Board*, 336 U. S. 245, 254); and that the line between the things which Congress has left to, and those which Congress has withdrawn from, State jurisdiction must be drawn case by

case upon the basis of the facts alleged, proved or found in the state courts (see *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474-7 and cases cited; *San Diego Unions v. Garmon*, 359 U. S. 236, 241, 243).

In *Machinists v. Gonzales*, 356 U. S. 617 at 619 this Court said:

> "As Garner v. Teamsters Union, 346 U. S. 485, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in *Garner—that the Act 'leaves much to the states'—is no less important*. See 346 U. S. at 488."

In dealing with State cases whose subject matter was concededly within the operation of the National Labor Relations Act, this Court has stressed the difficulty of determining "merely on the basis of a complaint and answer, whether the subject matter" had been withdrawn from state jurisdiction. *Weber v. Anheuser Busch, Inc.*, 348 U. S. 468, 481. However, we have not found, and Petitioners do not cite, any decision (even in the field where, as this Court has said, the Federal Act "leaves much to the states, though Congress has refrained from telling us how much") in which this Court did not decide the question whether the State court had, or could then exercise, jurisdiction, upon the facts alleged in the pleadings or established by the evidence in, or found by, the State court. Moreover, even a contrary holding in those cases would be a far cry from Petitioners' theory that, where, as in the case at bar, the facts alleged, proved and found in the state court clearly establish that the subject matter of the state action is in an area of labor management relations specifically ex-

cluded from the National Labor Relations Act, a state court does not have, or can not exercise, jurisdiction unless and until the NLRB shall have found and adjudged, as a matter of fact and law, that the subject matter of the state action is within an excluded area of labor management relations and within the jurisdiction of the state court. As applied to the instant case this contention of Petitioners is plainly frivolous.

Moreover, this contention of Petitioners is part and parcel of their long continued efforts to evade both state and federal jurisdiction (1) by resisting federal jurisdiction upon the ground that supervisors and their unions are excluded from the operation of the National Labor Relations act and (2) by resisting administrative or judicial state jurisdiction upon the grounds of exclusive or primary jurisdiction in the NLRB or of federal pre-emption. (R. 62, Fdg. 18.) In the instant case Petitioners are seeking to persuade this Court to lend its aid to a long continued scheme of evasion.

The disastrous consequences, which would follow from judicial sanction of Petitioners' theory, is strikingly demonstrated by the case at bar. If the Minnesota courts had not had, or could not have exercised, jurisdiction, the conduct of Petitioners would have been "entirely ungoverned." As found and held by the Minnesota Supreme Court (whose interpretation of State law is conclusive in this Court), Petitioners' conduct violated the statutes and public policy of that State. The facts alleged, proved and found in the Minnesota courts establish beyond debate that the NLRB could not have lawfully assumed or exercised jurisdiction or given any remedy. Nevertheless, if jurisdiction of the Minnesota courts could have been suspended until a futile proceeding dragged its way through the ad-

ministrative tribunal and possibly judicial review by a federal court, Respondents would have had no choice except to yield to the unlawful coercion of Petitioners; and the Minnesota courts would have been prevented from granting any effective relief. Petitioners declared their intention to picket every ship of Respondents which they could find. The losses which Respondents sustained, and would sustain, upon each ship in their fleet which was, or should become, immobilized by Petitioners' conduct, was $3,000 *a day,* exclusive of any profit. Inevitably Respondents would have had to yield to Petitioners' economic coercion which, as found and held by the Minnesota courts, violated the statute and public policy of that State; and judicial sanction of such a theory would leave Petitioners free to pursue such unlawful conduct without restraint and undeterred by any of the consequences which normally flow from, and deter, wrongful acts.

Manifestly, only the most compelling statutory language and the most unequivocal declaration of congressional intent could justify a holding which would entail such consequences. Here, however, to reach such a holding would require a court completely to disregard, and consequently to violate, the clear language used by the Congress and its unequivocally declared intent. Consequently, the doctrine of federal preemption and the doctrine of primary administrative jurisdiction are severally inapplicable and could not be used, separately or together, to reach, or to justify, such a result.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, are set forth below.

Act of June 23, 1947, c. 120, § 1(a) and §§ 2(3), 2(5), 2(11) and 14(a) of Title I, 61 Stat. 136, 137, 138, 151; U. S. Code, Title 29, §§ 152(3), 152(5), 152(11) and 164(a).

"AN ACT

"To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

* * * * *

"SECTION 1. (a) This Act may be cited as the 'Labor Management Relations Act, 1947.'

* * * * *

"TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

"SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

" 'DEFINITIONS

" 'SEC. 2. When used in this Act—

* * * * *

" '(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * * but shall not include * * * any individual employed as a supervisor, * * *.

* * * * *

"'(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

"'(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, *or* discipline other employees, *or* responsibly to direct them, *or* to adjust their grievances, *or* effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"'LIMITATIONS

"'SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.'"

APPENDIX B.

Legislative History of Pertinent Amendments to The National Labor Relations Act Which Were Made by Title I of The Labor Management Relations Act, 1947.

A. Reports of Congressional Committees.

1. Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess.

"It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests whereever they conflict with those of the rank and file. * * *

"* * * the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." (p. 5)

* * * * *

"Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity." (p. 28.)

2. House Report No. 245, H. R. 3020, 80th Cong., 1st Sess.

"The evidence before the committee showed this to be one of the most important and most critical problems. When Congress passed the Labor Act, we were

concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners', not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act." (p. 13.)

* * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer,' not an 'employee,' any person 'acting in the interest of an employer'; what it again made clear in taking up H. R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." (p. 17.)

B. Excerpts from Congressional Debates.

Statement by Senator Taft of Ohio:

"I shall try to summarize the changes which have been made. They are important. They make a substantial step forward toward the furnishing of equal bargaining power.

"The bill provides that foremen shall not be considered employees under the National Labor Relations

Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3836 (1947)